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8

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN JOSE DIVISION

12 GREGORY BENDER,
13
14 Plaintiff,

15 v.

16 INFINEON TECHNOLOGIES NORTH
AMERICA CORP., a Delaware
17 corporation, et al.,

18 Defendant and
19 Counterclaimant.
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Case No. C 09-02112 RS

**INFINEON TECHNOLOGIES NORTH
AMERICA CORP.'S NOTICE OF
MOTION AND MOTION TO STRIKE
PLAINTIFF'S INFRINGEMENT
CONTENTIONS AND TO DISMISS
THIS CASE PURSUANT TO RULE 37**

DISCOVERY MATTER

Date: Tuesday, May 11, 2010
Time: 10:00 a.m.
Courtroom: 2, 5th Floor
Judge: Hon. Howard R. Lloyd

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NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Tuesday, May 11, 2010, at 10:00 a.m., or as soon thereafter as the matter may be heard before the Court, located at 280 South 1st Street, San Jose, CA 95113, Courtroom 2, 5th floor, Defendant Infineon Technologies North America Corp. (“Infineon”), pursuant to Civil L.R. 1-4, 7-1, 7-2, Fed. R. Civ. P. 37(b), and Patent L.R. 1-2 and 3-1, will move the Court for an order striking Plaintiff Gregory Bender’s (“Plaintiff”) infringement contentions and dismissing this case with prejudice.

This motion is based on the Notice of Motion and Motion and the Memorandum of Points and Authorities incorporated herein, and on the Declaration of David A. Chase, the [Proposed] Order filed herewith, all of the files and records of this action, and any additional material that may be elicited at the hearing on this Motion.

RELIEF REQUESTED

1. Infineon seeks an order striking Plaintiff’s infringement contentions; and
2. Infineon seeks an order dismissing Plaintiff’s complaint with prejudice as against Infineon.

ISSUE TO BE DECIDED

1. Whether Plaintiff has failed to comply with the Court’s Orders requiring Plaintiff to comply with the Local Rules regarding Plaintiff’s infringement contentions, in violation of Federal Rule of Civil Procedure 37.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Over the past three months, Plaintiff has submitted three different sets of infringement contentions, and those infringement contentions all fail to comply with Patent L.R. 3-1. Plaintiff has deliberately disregarded three of this Court's Orders to comply. Having given Plaintiff more than ample opportunity and time to amend his infringement contentions to comply with the Patent Local Rules and this Court's Orders, it is appropriate to put an end to what has resulted, and will otherwise continue to result in, prejudice to Infineon and waste of the Court's resources, and stop Plaintiff's never-ending chain of deficient amended infringement contentions.

Infineon, therefore, moves this Court to strike Plaintiff's infringement contentions and dismiss this case with prejudice as against Infineon for two reasons. First, Federal Rule of Civil Procedure 37(b) and Federal Circuit precedent empower the Court to strike infringement contentions and dismiss a complaint where, in a case such as this, the plaintiff has disregarded the Court's local rules and orders regarding infringement contentions. In this case, Plaintiff failed to comply with the Court's Scheduling Order and Patent Local Rule 3-1 when he served his first deficient infringement contentions. Then Plaintiff failed to comply with the Court's Amended Scheduling Order requiring Plaintiff to serve supplemental infringement contentions that comply with Patent Local Rule 3-1. Finally, Plaintiff failed to comply with the Court's March 16, 2010 Order Granting Infineon's Motion to Compel complete contentions. This flagrant disregard for the Court's Rules and Orders is objectively unreasonable and sanctionable under Rule 37.

Second, Infineon will suffer severe prejudice unless the Court strikes Plaintiff's deficient infringement contentions and dismisses Plaintiff's complaint. Without any real explanation, Plaintiff's scattershot approach to the contentions includes accusing hundreds and hundreds of Infineon's products. Plaintiff's contentions remain only generalized, conclusory accusations, lacking any real detail or substance. Every time that Plaintiff serves deficient infringement contentions, Infineon incurs additional, and otherwise unnecessary, legal fees and costs attempting, in vain, to figure out Plaintiff's infringement theories against the enormous number of products that stand accused. In addition, Infineon continues to suffer prejudice in this case as

1 Plaintiff keeps Infineon in a state of limbo by failing to crystallize his infringement theories, as
 2 this case lingers under a vague accusation of infringement, and Infineon is forced to repeatedly
 3 seek relief from the Court.

4 Plaintiff should not be allowed to drag this case out indefinitely, wasting judicial
 5 resources and Infineon's time, resources, and money. Plaintiff has shown he has no intention of
 6 complying with the Court's rules and orders. Each installment of his contentions has made
 7 meaningless substitutions of a few words here and there. If anything, Plaintiff's contentions have
 8 become even more generic (and therefore worse) over time. Coupled with the enormous number
 9 of accused products, Plaintiff's generic infringement contentions have all of the hallmarks of a
 10 fishing expedition. The Court's Patent Local Rules and Orders were meant to curb such
 11 discovery abuses as Plaintiff's contentions. To give force and effect to the Court's rules and
 12 orders, Plaintiff's repeatedly deficient infringement contentions should be stricken, and this case
 13 should be dismissed. The consequences of the Plaintiff's deliberate disregard for the rules and
 14 orders of this Court should fall squarely on the Plaintiff.

15 **II. FACTUAL BACKGROUND**

16 **A. Plaintiff's First Infringement Contentions**

17 Plaintiff alleges that Infineon infringes claims 8 and 35 of the '188 Patent, which expired
 18 on August 4, 2009. On December 28, 2009, Plaintiff served infringement contentions on Infineon
 19 pursuant to Patent L.R. 3-1 ("first infringement contentions"). *See Chase Decl.* at ¶ 2.¹ Plaintiff's
 20 infringement contentions included five allegedly "representative" claim charts. But Plaintiff did
 21 not provide any explanation of how the five allegedly "representative" products represented the
 22 hundreds of Infineon products that he accused of infringing the '188 Patent. In addition, the
 23 claim charts failed to map the claim language to specific components of the allegedly accused
 24 amplifiers within the accused Infineon products. The following table illustrates the level of detail
 25 Plaintiff included in his first infringement contentions.²

26 ¹ As used in this Motion, "Chase Decl." refers to the Declaration of David A. Chase In Support Of
 27 Infineon Technologies North America Corp.'s Motion to Strike Plaintiff's Infringement Contentions and
 to Dismiss this Case Pursuant to Rule 37, filed concurrently with this Motion.

28 ² In the interests of consistency and for ease of comparison, Infineon will use the same claim element and
 associated contentions as an example of the lack of detail that Plaintiff provided in each of his three

Claim Language (first element of claim 8)	First Infringement Contentions for the PMB5701 Product
a first input buffer, having a single, non-inverting input of high impedance, an open loop voltage gain not exceeding unity, and a low impedance output	On information and belief, there are numerous instances of this element contained in the accused instrumentalities. Such locations include, but are not limited to the following: 1. This element is located in the 2100 MHz receiver input amplifier located in the receiver circuitry which is located in the integrated circuit contained in the product.
(See Chase Decl., Exh. D at 16:37-39.)	(See Chase Decl., Exh. C at 2-3.)

B. Plaintiff's Second Infringement Contentions and the Court's Amended Patent Scheduling Order

On January 26, 2010, the parties filed a joint motion to amend the scheduling order in this case. *See* D.I. 21. Between January 27, 2010 and February 7, 2010, Infineon and Plaintiff met and conferred regarding the deficiencies in Plaintiff's first infringement contentions. *See* Chase Decl. at ¶ 4. After several meet and confer sessions, Plaintiff slightly amended his claim charts on February 7, 2010 ("second infringement contentions"). *See* Chase Decl. at ¶ 5. Plaintiff's amendments, however, merely consisted of adding generic language parroting the asserted claim elements. *See* Chase Decl., Exh. E.

infringement contentions. In order to conserve space, Infineon has included only an excerpt from Plaintiff's infringement contentions for the first element of claim 8 of the '188 patent. But a review of Plaintiff's disclosures for other elements of claims 8 and 35 of the '188 patent shows that the deficiencies in the examples provided in this motion are found throughout all of the elements of asserted claims 8 and 35.

Claim Language (first element of claim 8)	Second Infringement Contentions for the PMB5701 Product
a first <u>input buffer</u> , having a single, non- inverting input of high impedance, an open loop voltage gain not exceeding unity, and a low impedance output (See Chase Decl., Exh. D at 16:37-39 (emphasis added).)	On information and belief, there are numerous instances of this element contained in the accused instrumentalities. Such locations include, but are not limited to the following: 1. This element is the <u>input buffer circuitry</u> located in the 2100 MHz receiver input amplifier located in the receiver circuitry which is located in the integrated circuit contained in the product. (See Chase Decl., Exh. E at 2-3 (emphasis added).)

Then, on February 10, 2010, the Court issued an Amended Patent Scheduling Order in which the Court ordered that Plaintiff serve supplemental infringement contentions by March 1, 2010. *See* D.I. 30 at 2. Plaintiff, however, ignored this Order and instead decided to rest on his contentions that had been served on February 7, 2010. *See* Chase Decl. at ¶ 6.

C. The Court's March 16, 2010 Order Granting Infineon's Motion to Compel Infringement Contentions that Comply with Patent L.R. 3-1

On February 9, 2010, Infineon filed a motion to strike Plaintiff's second infringement contentions or to compel infringement contentions that comply with Patent L.R. 3-1. *See* D.I. 26. The Court held a hearing on Infineon's motion on March 16, 2010 (*see* D.I. 42) and issued an order granting Infineon's motion to compel ("the Court's Order"). *See* D.I. 43. The Court ordered that Plaintiff amend his contentions by March 26, 2010 to "(a) demonstrate that 'representative' products are accurate representations of the hundreds of other accused products and (b) provide specific locations within [Infineon's] products where the alleged infringement occurs." *See* D.I. 43 at 4. The Court stated that "plaintiff's infringement contentions are impermissibly vague." *Id.* at 3. "[H]is claims charts provide generic allegations that do not identify specific circuitry or components that reportedly correspond to the claim limitations – or, at least, not in a manner that gives defendant fair notice as to where the alleged infringing circuits are located. Instead, Bender simply repeats the same generic descriptions and cuts-and-pastes them beside each element of every claim." *Id.* The Court warned Plaintiff that "[a]lthough the

1 court has declined to strike plaintiff's contentions at this time, they may well be stricken in the
2 future if they continue to be insufficient." *See id.* at 4.

3 **D. Plaintiff's Third Infringement Contentions**

4 Having been ordered to amend his infringement contentions, Plaintiff sent Infineon
5 amended claim charts on the night of March 26, 2010 ("third infringement contentions"). *See*
6 Chase Decl. at ¶ 7. But the same deficiencies that permeated Plaintiff's first and second
7 infringement contentions, and that the Court ordered Plaintiff to resolve through amendment,
8 remained unresolved yet again. Rather than addressing the Court's specific instructions in its
9 March 16, 2010 Order, Plaintiff simply loaded his contentions with more generic claim language.

Claim Language (first element of claim 8)	Third Infringement Contentions for the PMB5701 Product
<p>a first input buffer, having a single, non- inverting input of <u>high impedance</u>, an open loop voltage <u>gain not exceeding unity</u>, and a <u>low impedance output</u></p> <p>(<i>See Chase Decl., Exh. D at 16:37-39 (emphasis added).</i>)</p>	<p>On information and belief, there are numerous instances of this element contained in the accused instrumentalities. Such locations include, but are not limited to the following:</p> <p>1. This element corresponds to the <u>high input impedance</u> and <u>low output impedance unity or less gain</u> input circuitry which is built out of semiconductor devices and passive electrical components using a non differential pair configuration electrically coupled to the input of the amplifier located in the 2100 MHz receiver input amplifier located in the receiver circuitry which is located in the integrated circuit contained in the product.</p> <p>(<i>See Chase Decl., Exh. F at 3-4 (emphasis added).</i>)</p>

19
20 Not only did Plaintiff insert claim language into his contentions, but he made insignificant word
21 changes that make the contentions just as generic as they were before (if not more so) when the
22 Court found them deficient. Specifically, for example, Plaintiff insignificantly modified the
23 contentions concerning the fifth and seventh elements of claim 8. In the fifth element of claim 8,
24 Plaintiff replaced "second input stage" with "gain stage."³ *Compare* Chase Decl., Exh. E at 12;
25 *with* Chase Decl., Exh. F at 17. But this is no more specific because according to claim 8, both
26 the first and second stages have a "gain." *See* Chase Decl., Exh. D at 16:37-39, 46-49 (first input

27
28 ³ Plaintiff also changed these terms on the claim language side of his claim charts, not just the contentions
side of his claim charts. *Compare* Chase Decl., Exh. E at 12; *with* Chase Decl., Exh. F at 17.

stage with first input buffer having “an open loop voltage gain not exceeding unity”); *id.* at 16:50-54 (“a second input stage, similar in form and function to said first input stage . . .”). Thus, Plaintiff’s insignificant re-wording of “second input stage” to “gain stage” says nothing more than what was already found deficient by the Court. In the seventh element of claim 8, Plaintiff replaced “dual voltage supply rails” with “voltage supply for the amplifier.” *Compare* Chase Decl., Exh. E at 16; *with* Chase Decl., Exh. F at 23. Plaintiff also included this “new” claim language – “voltage supply for the amplifier” – in his contentions for this element. And this generic language – “voltage supply for the amplifier” – is even *more generic* than the language in his deficient second infringement contentions – “dual voltage supply rails.” *Compare* Chase Decl., Exh. F at 23; *with* Chase Decl., Exh. E at 16.

E. The Parties’ Meet and Confer Efforts

On March 31, 2010, Infineon’s counsel sent counsel for Plaintiff an e-mail describing continued deficiencies in Plaintiff’s third infringement contentions and stating that Infineon planned to file on April 5, 2010 a motion challenging Plaintiff’s contentions. *See* Chase Decl. at ¶ 9. When Plaintiff did not respond to this e-mail, on April 1, 2010, Infineon’s counsel twice called counsel for Plaintiff to meet and confer. *See* Chase Decl. at ¶ 10. On April 2, 2010, Plaintiff’s counsel responded to the March 31, 2010 meet and confer e-mail and requested that counsel meet and confer on April 5, 2010. *See* Chase Decl. at ¶ 11. On April 5, 2010, Infineon’s counsel met and conferred with counsel for Plaintiff. *See* Chase Decl. at ¶ 12. The parties did not reach a resolution regarding their dispute over the insufficiency of Plaintiff’s infringement contentions as a result of the meet and confer process. *See* Chase Decl. at ¶ 15.

III. ARGUMENT

A. Striking Plaintiff’s Infringement Contentions and Dismissing this Case Is Appropriate Under Rule 37 of the Federal Rules of Civil Procedure and Federal Circuit Precedent

When a party fails to comply with a court order, the court where the action is pending has broad authority to sanction the disobedient party. *See* FED. R. CIV. P. 37(b)(2)(A). Where, as here, a party has failed to comply with a discovery order, the issuing court has authority to “issue further just orders,” including orders “striking pleadings in whole or in part” and “dismissing the

1 action or proceeding in whole or in part.” *See* FED. R. CIV. P. 37(b)(2)(A)(iii) and (v). Under
 2 Rule 37(b), sanctions require only a finding that the disobedient party failed to comply with a
 3 court order. *See* FED. R. CIV. P. 37(b) (titled “Failure to Comply with a Court Order”); Advisory
 4 Comm. Notes to 1970 Amendments (substituting “failure” for “refusal” to clarify that willfulness
 5 is not necessary—failure to comply is sufficient to trigger sanctions); *Hyde & Drath v. Baker*, 24
 6 F.3d 1162, 1171 (9th Cir. 1994). The standard of sanctionable conduct is one of objective
 7 reasonableness. *Finley v. Hartford Life & Accident Ins. Co.*, 249 F.R.D. 329, 331 (N.D. Cal.
 8 2008). “While a finding of bad faith is not a requirement for imposing sanctions, good or bad
 9 faith may be a consideration in determining” the severity of the sanction. *Hyde*, 24 F.3d at 1171.

10 Courts consider five factors when dismissing an action under Rule 37. Importantly, these
 11 five factors are “not a series of conditions precedent before the judge can do anything, but a way
 12 for a district judge to think about what to do.” *In re Phenylpropanolamine (PPA) Prods. Liab.*
 13 *Litig.* [“PPA”], 460 F.3d 1217, 1226 (9th Cir. 2006). The five factors are “(1) the public’s
 14 interest in expeditious resolution of litigation; (2) the court’s need to manage its dockets; (3) the
 15 risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases
 16 on their merits; and (5) the availability of less drastic sanctions.” *Henry v. Gill Indus., Inc.*, 983
 17 F.2d 943, 947 (9th Cir. 1993). The “key factors” are prejudice and the availability of lesser
 18 sanctions. *See id.* Dismissal is proper where the conduct was “due to willfulness, bad faith *or*
 19 fault of the party.” *See PPA*, 460 F.3d at 1233 (italics in original). “Disobedient conduct not
 20 shown to be outside the litigant’s control meets this standard.” *Id.* That is exactly what Plaintiff
 21 has engaged in – disobedient conduct not outside his control. As is further discussed herein, each
 22 and every one of the five factors supports striking Plaintiff’s infringement contentions and
 23 dismissing this case with prejudice. Plaintiff’s repeated failures to provide compliant
 24 infringement contentions has stalled this litigation, wasted the parties’ and the Court’s resources,
 25 and prejudiced Infineon. Plaintiff has repeatedly demonstrated that Court Orders
 26 notwithstanding, he has no intention of complying with the Patent Local Rules. Each installment
 27 of his contentions has made marginal, meaningless amendments, amounting to changing a few
 28 words here and there. This demonstrates Plaintiff’s deliberately disobedient conduct.

1 Not only do the factors identified above support dismissal in this case, but also precedent
2 from the Federal Circuit supports dismissal of Plaintiff's complaint under Rule 37. *See Refac*
3 *Int'l, Ltd. v. Hitachi, Ltd.*, 921 F.2d 1247, 1250 (Fed. Cir. 1990) (affirming dismissal of complaint
4 for failing to comply with magistrate judge's order compelling more specific infringement
5 contentions). In *Refac*, the Federal Circuit affirmed a district court's dismissal of a complaint
6 based on the plaintiff's failure to comply with the magistrate judge's order compelling the
7 plaintiff to provide more detailed infringement contentions. *See* 921 F.2d at 1250. The
8 magistrate judge ordered the plaintiff to "specifically stat[e] (1) which products are infringing of
9 each defendant; (2) which elements of each claim are present in the accused devices and (3)
10 which elements of each claim are present in each accused device under the doctrine of
11 equivalents." *Id.* at 1251. But the plaintiff's supplemental contentions failed, among other
12 things, to "identify the elements of any specific product corresponding with the patent claim
13 elements." *See id.* The defendants moved to dismiss, and the magistrate judge issued an order
14 recommending that the district judge direct entry of judgment of noninfringement and dismiss the
15 plaintiff's complaint with prejudice. *See id.* at 1252-53. In accordance with the magistrate
16 judge's recommendation, the district judge entered judgment of noninfringement for each of the
17 defendants' accused products and dismissal of the action. *See id.* The district judge also ordered
18 Refac to pay the defendants' reasonable attorneys fees for having to oppose Refac's motion for
19 reconsideration. *See id.* at 1253. On appeal, the Federal Circuit affirmed the district court's order
20 because it found that the district court's finding of noncompliance with the magistrate judge's
21 order was not clearly erroneous. *See id.* at 1254, 1256.

22 The principles and outcome in *Refac* apply with equal force to this case. Plaintiff has
23 shown an utter disregard for this Court's rules and orders. Plaintiff's generalized, scattershot
24 approach to the infringement contentions, accusing hundreds of Infineon's products with no real
25 explanation, has severely prejudiced Infineon and wasted the Court's resources. Just as in *Refac*,
26 Plaintiff's deliberate disregard for the Court's rules and orders, prejudice to Infineon, and waste
27 of the Court's resources, all call for striking Plaintiff's infringement contentions and dismissing
28 this case with prejudice.

1 **B. Plaintiff's Infringement Contentions Repeatedly Failed to Comply with the**
 2 **Requirements of the Court's Rules and Orders**

3 The Court's Order, particularly in light of the many orders addressing Plaintiff's
 4 infringement contentions in related cases within this District, clearly notified Plaintiff what was
 5 deficient in his infringement contentions. The Court identified at least four key deficiencies in
 6 Plaintiff's infringement contentions. The four key deficiencies fall within two broader
 7 requirements that the Court specifically listed. The first requirement is that Plaintiff must
 8 "demonstrate that 'representative' products are accurate representations of the hundreds of other
 9 accused products." *See* D.I. 43 at 4:2-3. The second requirement is that Plaintiff must "provide
 10 specific locations within [Infineon's] products where the alleged infringement occurs." *See* D.I.
 11 43 at 4:3-4. But Plaintiff failed to comply with the two requirements set forth in the Court's
 12 Order and failed to address or remedy the deficiencies that the Court identified in its Order.

13 1. Plaintiff Failed to Comply with the Court's Order to Demonstrate that the
 14 Allegedly "Representative" Products Are Indeed Representative of All the
 Accused Infineon Products

15 The following bullet points demonstrate that Plaintiff has done nothing meaningful to
 16 address the deficiencies identified in the Court's Order regarding the five allegedly
 17 "representative" products.

- 18 1. Court's Order: "Bender has made no showing that his use of 'representative' claim charts
 19 is proper. Other than plaintiff's bare assertion, there is nothing in the record presented
 20 indicating, for example, that the five products for which plaintiff provided claim charts
 21 share common circuitry with the other accused products." D.I. 43 at 3:6-9.
- 22 • Plaintiff's Second Infringement Contentions: "The products and families indicated
 23 below are a representative sample of products which contain Current Feedback and
 24 Voltage Feedback Amplifiers." *See* Chase Decl., Exh. E at 1.
 - 25 • Plaintiff's Third Infringement Contentions: "The following claim charts . . . show . . .
 26 representative samples of the types of products and amplifiers which infringe claims
 27 35 and 8. They are representatives as to their respective families of products in that
 28 they, and their respective families, will share the same or substantially similar analog

amplifier circuitry in their common applications . . . within their common modules.

Such same modules are used in building many different complex integrated circuit products but they will all have the same or substantially similar analog amplifier circuitry within the modules. The circuitry in such analog amplifiers contained in these modules are common to the products, whether it is a transceiver, wireless communication product, or a microcontroller with analog processing circuitry.

Plaintiff contends that the buffered transconductance amplifier is a fundamental building block common to these modules.” See Chase Decl., Exh. F at 1-2 (emphasis added).

- Unaddressed / Remaining Deficiencies: Plaintiff’s third infringement contentions add more words regarding the allegedly “representative” products, but the words are empty. They convey no substantive description of why Plaintiff apparently believes that the five allegedly “representative” products accurately represent the hundreds of accused Infineon products. Plaintiff’s third infringement contentions do nothing more than repeat the very deficiency that the Court explicitly identified – Plaintiff’s “bare assertion” that the “representative” products share common circuitry with the hundreds of other accused Infineon products. Plaintiff “contends” and states that the five “representative” products share common or substantially similar circuitry with the hundreds of other accused Infineon products. But that is just it – Plaintiff “contends” and states without providing any support or basis for those statements.

2. Court’s Order: “Further muddying the waters is plaintiff’s grouping of the accused products into rather broad and amorphous categories that, on their face, do not appear to readily correspond to the labels used in his claim charts.” D.I. 43 at 3:9-11.

- Plaintiff’s Second Infringement Contentions: Plaintiff divided the accused Infineon products into eight categories: (1) Cellular RF Transceivers, (2) Tuner ICs and demodulators, (3) Wireless Communication Products, (4) RF power products, (5) Integrated Power Amplifiers, (6) Wireless Control, (7) USB Audio, and (8) Micro-Controllers with build in ADC or DAC. See Chase Decl., Exh. E at 1.

- 1 • Plaintiff's Third Infringement Contentions: Plaintiff divided the accused Infineon
2 products into the same eight categories: (1) Cellular RF Transceivers, (2) Tuner ICs
3 and demodulators, (3) Wireless Communication Products, (4) RF power products,
4 (5) Integrated Power Amplifiers, (6) Wireless Control, (7) USB Audio, and (8) Micro-
5 Controllers with built-in ADC or DAC. *See* Chase Decl., Exh. F at 1.
- 6 • Unaddressed / Remaining Deficiencies: Plaintiff did nothing to address the Court's
7 Order with respect to Plaintiff's grouping of Infineon's products. The Court identified
8 that Plaintiff's "grouping of the accused products into rather broad and amorphous
9 categories" was a problem in Plaintiff's previous claim charts. Plaintiff's response to
10 the Court's statement was to do absolutely nothing. Plaintiff's grouping of the
11 accused Infineon products remains unchanged and is therefore still "broad and
12 amorphous" and fails to correspond to the claim charts for the five allegedly
13 "representative" products. Plaintiff has made no effort to provide the requisite detail.
14 For example, Plaintiff's claim chart for the PMB5701 lists the "family" of that product
15 as "Transceivers." *See* Chase Decl., Exh. F at 3. But "Transceivers" is not one of the
16 eight listed categories. Moreover, transceivers are found in nearly all, if not all,
17 Infineon products. Therefore, "transceivers" cannot be a family of accused Infineon
18 products.

19 2. Plaintiff Failed to Comply with the Court's Order to Identify Specific
20 Locations Within Infineon's Products Where the Alleged Infringement
21 Occurs

22 The following bullet points demonstrate that Plaintiff has done nothing of substantive
23 value to address the Court's Order regarding Plaintiff's failure to identify specific circuitry or
24 components that allegedly correspond to the claim limitations.

- 25 1. Court's Order: "[Plaintiff's] claim charts provide generic allegations that do not identify
26 specific circuitry or components that reportedly correspond to the claim limitations – or, at
27 least, not in a manner that gives defendant fair notice as to where the alleged infringing
28 circuits are located." *See* D.I. 43 at 3:13-16.

- 1 • Plaintiff's Second Infringement Contentions: "This element is the input buffer
2 circuitry located in the 2100 MHz receiver input amplifier located in the receiver
3 circuitry which is located in the integrated circuit contained in the product." *See*
4 Chase Decl., Exh. E at 2-3.
- 5 • Plaintiff's Third Infringement Contentions: "This element corresponds to the high
6 input impedance and low output impedance unity or less gain input circuitry which is
7 built out of semiconductor devices and passive electrical components using a non-
8 differential pair configuration electrically coupled to the input of the amplifier located
9 in the 2100 MHz receiver input amplifier located in the receiver circuitry which is
10 located in the integrated circuit contained in the product." *See* Chase Decl., Exh. F at
11 3-4.
- 12 • Unaddressed / Remaining Deficiencies: Plaintiff's third infringement contentions do
13 not "identify specific circuitry or components that reportedly correspond to the claim
14 limitations" as the Court warned Plaintiff with respect to Plaintiff's second
15 infringement contentions. The only change that Plaintiff made was to disassemble
16 some of the claim language and reassemble it in a slightly different order. In the
17 example above, Plaintiff's third infringement contentions merely substituted "input
18 buffer circuitry" with "high input impedance and low output impedance unity or less
19 gain input circuitry." But a buffer *is*, by Plaintiff's expert's own definition, high input
20 impedance and low output impedance unity or less gain circuitry. *See* Chase Decl.,
21 Exh. G at 59:23-60:11 ("I – I mean, this is conventionally what a buffer is, right. It's a
22 high-impedance – high input impedance, low output impedance, unity gain amplifier. .
23 . . That's sort of the operational definition of a buffer.") Therefore, all that Plaintiff
24 has done in his third infringement contentions is define the word "buffer" with
25 language from the claim itself. In other words, Plaintiff has provided absolutely no
26 more detail in his contentions than what the claim already says. *Plaintiff thus made*
27 *his contentions just as generic as they were before when the Court found them*
28 *deficient.* Moreover, Plaintiff's inclusion of language that such "input circuitry" is

built “out of semiconductor devices and passive electrical components” is of no value because electronic devices are, by their very nature, built “out of semiconductor devices and passive electrical components.” That in no way informs Infineon of the “specific circuitry or components that reportedly correspond to the claim limitations” as required by the Court’s Order. *See* D.I. 43 at 3:13-16. Rather, it is just another instance of Plaintiff using generic language that covers more than what is claimed in the asserted claims. Indeed, Plaintiff’s generic language could cover all kinds of amplifiers, including prior art amplifiers. But Plaintiff did not receive a patent on all kinds of amplifiers; he received a patent on one particular type of amplifier circuit.

2. Court’s Order: “Bender simply repeats the same generic descriptions and cuts-and-pastes them beside each element of every claim.” *See* D.I. 43 at 3:16-17.

- Plaintiff’s Second Infringement Contentions: For all of the five allegedly “representative” products, Plaintiff copied-and-pasted the same language up to sixteen times for a particular claim element. For example, for all five of the allegedly “representative” products, Plaintiff’s contentions for the first element of claim 8 stated that “[t]his element is the input buffer circuitry located in [one of up to 16 ‘locations’ depending on the allegedly ‘representative’ product].” *See* Chase Decl., Exh. E at 2-4, 40-41, 62-64, 87-88, 102.
- Plaintiff’s Third Infringement Contentions: For all of the five allegedly “representative” products, Plaintiff copy and pasted the same language up to sixteen times for a particular claim element. For example, for all five of the allegedly “representative” products, Plaintiff’s contentions for the first element of claim 8 state that “[t]his element corresponds to the high input impedance and low output impedance unity or less gain input circuitry which is built out of semiconductor devices and passive electrical components using a non differential pair configuration electrically coupled to the input of the amplifier located in [one of up to 16 ‘locations’ depending on the allegedly ‘representative’ product].” *See* Chase Decl., Exh. F at 3-8, 54-57, 84-87, 117-19, 136.

- Unaddressed / Remaining Deficiencies: Plaintiff employed the same copy-and-paste approach in his third infringement contentions that he did in his second infringement contentions. In other words, Plaintiff simply failed to address the Court's Order.

C. Plaintiff's Failure to Comply with the Court's Rules and Orders Is Objectively Unreasonable, Willful, and Plaintiff's Own Fault

Plaintiff's repeated failure to comply with Patent L.R. 3-1, Judge Ware's Amended Scheduling Order and the Court's Order Granting Infineon's Motion to Compel is objectively unreasonable and willful. Plaintiff continues to play word games in his infringement contentions, with his minor word-smithing for each installment, resulting in even more generic contentions, rather than showing any good faith effort to provide the kind of detail he knows is required.

Plaintiff's failure to provide compliant contentions is his own fault and is not outside his control because, according to Plaintiff's own expert, Plaintiff could purchase an accused Infineon product and analyze the specific components within that product. *See Chase Decl., Exh. G at 47:5-48:2.* It is not a case of Plaintiff not being able to provide the necessary detail; it is a case of Plaintiff willfully choosing not to provide the necessary detail. This inescapable conclusion is reinforced by the fact that Plaintiff continues to assert the same flawed rationale for failing and refusing to provide the required level of detail and analysis in his contentions. Specifically, Plaintiff was unsure whether he could provide any further detail in his contentions, having never purchased, used, or analyzed a physical Infineon product. *See Chase Decl. at ¶¶ 13-14.* But the Court explicitly rejected Plaintiff's flawed position, stating that "[s]uffice to say that Bender (not defendant) bears the burden of identifying specifically where each and every claim element is found within the accused products." *See D.I. 43 at 3:22-23.* Because Plaintiff has repeatedly and willfully failed to comply with the Court's rules and Orders, the Court should dismiss Plaintiff's claims against Infineon.

D. Plaintiff's Infringement Contentions Continue to Waste Judicial Resources

The Ninth Circuit has stated that the public's interest in expeditious resolution of litigation and the court's need to manage its docket favor imposing a dismissal sanction "in most cases." *See Henry*, 983 F.2d at 947. And this case is a perfect example of how a party's failure to abide

by court rules and orders wastes judicial resources and abuses the court system. Specifically, Plaintiff's "'shotgun' approach" to his infringement contentions undermine the "overriding principle of the Patent Local Rules[, which is to] make the parties more efficient, to streamline the litigation process, and to articulate with specificity the claims and theory of a plaintiff's infringement claims." See *Bender v. Micrel Inc.*, 2010 U.S. Dist. LEXIS 18134, at *7 (N.D. Cal. Feb. 6, 2010); *Intertrust Techs. Corp. v. Microsoft Corp.*, 2003 U.S. Dist. LEXIS 22736, at *6 (N.D. Cal. Nov. 26, 2003). Accusing hundreds of products without providing the requisite level of specificity as to representative products and a mapping of each claim element to the accused products, after being warned by the Court in this and several other cases, is simply inexcusable. It wastes the Court's time and resources and prolongs the resolution of this action, both of which weigh strongly in favor of dismissing Plaintiff's complaint.

E. Plaintiff's Infringement Contentions Continue to Prejudice Infineon

Infineon has already incurred what would otherwise have been unnecessary legal expenses because of Plaintiff's failure to comply with Patent L.R. 3-1, Judge Ware's Amended Scheduling Order and the Court's Order Granting Infineon's Motion to Compel. If Plaintiff's third infringement contentions are not stricken and the case is not dismissed, Infineon will continue to suffer financial harm, and just as importantly, will be prejudiced in this case.

Plaintiff has now provided three installments of infringement contentions, and none of the amendments has complied with the Court's various Orders. With every noncompliant amendment that Plaintiff makes, Infineon incurs more legal expenses defending itself against deficient infringement contentions. Infineon should not continue to be forced to defend itself, and pay for that defense, against what have repeatedly proven to be Plaintiff's insufficient infringement contentions.

Just as important as the cost of defending against Plaintiff's deficient contentions is the prejudice that Infineon will suffer if this case is allowed to proceed. If this case proceeds, Infineon will have to open the doors to its confidential information and watch Plaintiff's scattershot litigation approach turn into a discovery fishing expedition. Furthermore, if this case proceeds and Plaintiff does not crystallize specifically what his infringement theories are, then

Infineon could end up having to defend itself against a moving target. Given that there has been no indication that Plaintiff will provide compliant infringement contentions, dismissal is the only solution available to ensure that Infineon does not suffer unwarranted prejudice at the hands of a plaintiff who has deliberately disregarded, and continues to deliberately disregard, the Court's Rules and Orders.

F. Plaintiff Has Had Ample Opportunity to Amend His Contentions and to Litigate His Case on the Merits

This case has been pending for over ten months. Plaintiff has had more than amply opportunity and time to analyze the accused products and identify the specific locations within the amplifiers in those products that allegedly infringe the '188 Patent. But Plaintiff has not done so. Instead, Plaintiff's failure to comply with the Court's rules and Orders, and Plaintiff's failure to take advantage of several opportunities to amend his infringement contentions to comply with Patent L.R. 3-1 has stalled this case. If Plaintiff were truly interested in moving this case forward to litigate his claims on the merits, then he should have complied with Patent L.R. 3-1 and provided sufficient infringement contentions. Having failed to provide compliant contentions three times now, Plaintiff cannot complain that he has not been afforded every opportunity to litigate his case on the merits.

G. Dismissal Is the Only Available Sanction Because Lesser Sanctions Have Already Been Imposed And Plaintiff Has Shown No Intention of Complying

The Court has admonished Plaintiff for his failure to comply with Patent L.R. 3-1. *See* D.I. 43 at 3-4. The Court has warned Plaintiff that his contentions will be stricken if they do not comply with Patent L.R. 3-1. *See* D.I. 43 at 4. In fact, Plaintiff has heard this not only in this case, but also in several other cases that he filed in this District. *See, e.g., Bender v. Advanced Micro Devices, Inc.*, 2010 U.S. Dist. LEXIS 11539, at *5 (N.D. Cal. Feb. 1, 2010); *Bender v. Micrel, Inc.*, 2010 WL 520513, at *3 (N.D. Cal. Feb. 6, 2010). In light of Plaintiff's failure to produce compliant infringement contentions three times in this case (let alone in other related cases), there is no end in sight if Plaintiff is allowed to amend his contentions over and over again. There is no indication, given Plaintiff's record in this case and other related cases, that he

will comply with the Court's Orders if he is given yet another opportunity to amend his contentions. Compelling Plaintiff to provide compliant infringement contentions simply has not worked. The only remaining solution is to strike his contentions and dismiss this case with prejudice.

IV. CONCLUSION

For the foregoing reasons, Infineon respectfully moves the Court for an order (1) striking Plaintiff's infringement contentions and (2) dismissing Plaintiff's complaint with prejudice as against Infineon.

Respectfully submitted,

Dated: April 5, 2010

By: /s/ Daniel R. Foster

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CERTIFICATE OF SERVICE

I am over the age of eighteen years and not a party to the within-entitled action. My business address is 18191 Von Karman Avenue, Suite 500, Irvine, CA 92612. I served a copy of the following document(s) as follows:

INFINEON TECHNOLOGIES NORTH AMERICA CORP.'S NOTICE OF MOTION AND MOTION TO STRIKE PLAINTIFF'S INFRINGEMENT CONTENTIONS AND TO DISMISS THIS CASE PURSUANT TO RULE 37

I electronically filed the with the Clerk of the Court using the CM/ECF system



By transmitting via electronic mail the document(s) listed above to the email addresses set forth below on this date



By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Menlo Park, California addressed as set forth below.



By Personal Service: I served a true copy to each person[s] named at the address[es] shown.



By Federal Express: I placed a true copy in a sealed envelope addressed as indicated above, on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for delivery by Federal Express. Pursuant to that practice, envelopes placed for collection at designated locations during designated hours are delivered to Federal Express with a fully completed air bill, under which all delivery charges are paid by McDermott Will & Emery LLP, that same day in the ordinary course of business.

Executed on April 5, 2010, at Irvine, California.

/s/ Terri Carman
TERRI CARMAN

ORC 476916-1.072750.0035